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EQUITY PLEADING: THE MANNER OF OBJECTING TO A BILL
FOR DISCOVERY OBJECTIONABLE ON ITS FACE.

In the United States, constitutional provisions as a rule protect against self-incrimination.¹ The provisions of the various constitutions were, however, nothing more than enactments of the chancery rules as they existed in England at the time of their adoption. For more than two centuries at least it has been the admitted rule of the English courts that no witness could be compelled to give discovery in equity if the tendency of such discovery would be to incriminate himself.² This general proposition has never been doubted, and it would certainly seem to make no difference in the rule that the civil suit was based on facts, which also would give rise to a criminal liability as well, and so it has been generally held.³ In the light of this rule the recent case of *National Association of Operative Plasterers v. Smithies*⁴ might seem an anomaly. The point of the decision is, however, the manner in which, under the present English practice, objection against incriminating discovery should be formally made. The case was a civil action for damages for a conspiracy to induce workmen to break their contracts with the plaintiff. The plaintiff called on the defendant to produce certain documents relating to the conspiracy which the defendant refused to do on the ground that they contained matters which would tend to incriminate him by making him subject to a criminal action for conspiracy. The master made the usual order for relevant documents under the English practice. It would seem that the objection of the defendant to producing the documents was not made upon oath. The court overruled the defendant's objection to complying with the master's order and compelled the production of the documents. The opinions of the various judges are brief and unsatisfactory to one unfamiliar with the English practice

¹ Fifth Amendment to the Constitution of the United States; Article I, Sec 9, of the Constitution of Pennsylvania, both of which have been interpreted to apply to testimony in civil as well as criminal actions.

² *Oliver v. Haywood*, 1 Hust. 82; *Claridge v. Hoare*, 14 Ves. 59; Mitford's Equity Pleadings by Jeremy, 194; Story's Equity Pleadings (5th Ed.) Sec. 575-98; Bispham's Principles of Equity (7th Ed.) Sec. 562.

³ *Chambers v. Thompson*, 4 Bro. Ch. 434 (1793); *Thorpe v. Macauley*, 5 Madd. 218, 229 (1820); *Glynn v. Houston*, 1 Keen Ch. 329 (1836); *Marsh v. Davison*, 9 Paige (N. Y.) 580 (1842); Story's Equity Pleadings (5th Ed.) Sec. 597.

⁴ L. R. 1906 A. C. 434.

and seem to show that the basis of the decision of the court was that the objection was not taken under oath.⁵

The court in its decision relies mainly on the cases of *Allhusen v. Labouchere*⁶ and *Spokes v. Grosvenor Hotel Co.*⁷ In the former⁸—quoted from in both the subsequent cases⁹—James, L. J., said, “Nobody was ever allowed to object to a relevant question because that question tended to incriminate himself. He might object to answer it, but it was never a ground of demurrer to an interrogatory, or a ground for striking it out, that the answer might involve him in a crime.” It is submitted that this statement largely relied on for the decision in the main case¹⁰ is essentially untrue. Under the old chancery practice a demurrer was always a proper mode to object to a bill like that in *Allhusen v. Labouchere*⁶ where the objection was apparent on the face of the bill.¹¹ That the objection was so apparent in the main case¹⁰ is evident since the facts alleged gave rise to both a civil and criminal action for conspiracy, hence, any material relevant to the plaintiff’s case in the civil action would also be relevant in a criminal action against the defendant. Indeed, it has been several times held in England that the court will strike out interrogatories objectionable on their face though the defendant specifically refused to answer them under oath.¹² These latter cases, which are on their facts exactly in point, would seem to control the case in hand. The court in its decision cites no statute, though a statute or positive rule of court would of course control the decision, and evidently relies on what it considers to have been the practice in the old court of chancery—its interpretation of which, it is submitted, is far from accurate.

⁵ Lord Macnaghten on 437 quoting from *Allhusen v. Labouchere* (*infra*) says: “But then he must take the objection on his oath, and if he does raise that objection on his oath in the proper way he is not bound to answer the interrogatory.”

⁶ L. R. 3 Q. B. D. 654 (1878).

⁷ (1897) 2 Q. B. 124.

⁸ *Allhusen v. Labouchere*, L. R. 3 Q. B. D. at 660.

⁹ *Spokes v. Hotel Co.* (*supra*); *National Association of Plasterers v. Smithies* (*supra*).

¹⁰ *National Association of Plasterers v. Smithies* (*supra*).

¹¹ *Chambers v. Thompson* (*supra*); Kent, Ch. in *Sharp v. Sharp*, 3 John. Ch. (N. Y.), 407 (1818); *Glynn v. Houston* (*supra*); *Marsh v. Davison* (*supra*); *N. W. Bank v. Nelson*, 1 Gratt. (Va.) 108 (1844); *Bray on Discovery* (1885) 318.

¹² *Hill v. Campbell*, L. R. 10, C. P. 222 (1875); *Atherley v. Harvey*, L. R. 2, Q. B. D. 524 (1877); *Tupling v. Ward*, 6 H. & N. 749 (1861); cf. also *Hare on Discovery* 149 (1849).